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IN THE

# Supreme Court of the United States

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OCTOBER 1942 TERM

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No. 504

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ROBERT G. EWALD,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I.

### STATEMENT OF JURISDICTION

Petitioner herein, prays this court for a writ of certiorari to the Supreme Court of the State of Michigan to review the affirmance by that court on June 5, A. D.

1942, of which it denied a rehearing October 8, A. D. 1942, of petitioner's conviction of a felony commonly known as accepting a bribe by a public officer, in Recorder's Court for the City of Detroit; and the said Supreme Court of the State of Michigan being the highest court of said state, and it having by its final judgment of June 5, A. D. 1942, deprived petitioner of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, which is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding para-

graph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

It is claimed that this petitioner's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the determination of the Supreme Court of the State of Michigan because he was tried in a court not having competent jurisdiction. *Scott v. McNeal,* 154 U. S. 46, 4 S. Ct. 1108, 38 L. Ed. 896; *Central of Georgia R. Co. v. Mason,* 110 Fed. 865; *Charles v. Marion,* 98 Fed. 166; *In re Kelly,* 46 Fed. 653; *In re Monroe,* 46 Fed. 52.

It is further claimed by petitioner that his rights under the due process clause were violated by denial of his right to be confronted by the witnesses against him. *West v. State of Louisiana,* 194 U. S. 258, 48 L. Ed. 956; *Powell v. Alabama,* 287 U. S. 45, 63 S. Ct. 55, 77 L. Ed. 78; *DeYonge v. Oregon,* 299 U. S. 383, 57 S. Ct. 255; *Grosjean v. American Press Company, Inc.,* 297 U. S. 233, 56 S. Ct. 444; *Gitlow v. People of the State of New York,* 268 U. S. 652, 45 S. Ct. 625; and *Near v. State of Minnesota,* 283 U. S. 697, 51 S. Ct. 625.

The last foregoing cases are pronouncements of this Court holding that denial of fundamental rights such as freedom of speech, freedom of the press, right to counsel, etc., are violations of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

## II.

## STATEMENT OF FACTS

This brief is filed in support of a petition for a writ of certiorari to the Supreme Court of the State of Michigan to review that court's affirmance of petitioner's conviction of accepting a bribe in Recorder's Court for the City of Detroit.

Petitioner was convicted (R. 137) before Honorable W. McKay Skillman, one of the Judges of Recorder's Court for the City of Detroit, by a jury, September 19, A. D. 1941, of the crime commonly called accepting a bribe by a public officer, and sentence was imposed October 10, A. D. 1941 (R. 138-140) that petitioner be confined to the State Prison of Southern Michigan for a period of not less than three (3) years or more than ten (10) years, without recommendation.

Thereafter, December 18, 1941, claim of appeal to the Supreme Court of the State of Michigan was filed, and after a hearing on the merits the Supreme Court affirmed the conviction on June 5, 1942. A petition for rehearing was denied October 8, 1942 (see certified record).

Petitioner, at the time this matter arose and many years prior thereto, was a member of the Common Council of the City of Detroit, the legislative body of that city, which body was clothed with certain administrative duties, among which was the duty of approving contracts to which the city or any city commission or board was to become a part (R. 27). There existed in the city a commission known as Detroit Housing Commission, created by an act of the Michigan Legislature and certain city ordinances, the function of which was to furnish low cost housing for certain residents of the

city (R. 29). At the time in question this commission was engaged in letting contracts for the construction of a housing project commonly referred to as Herman Gardens Housing Project. Pursuant to these efforts of this Commission there were two contracts submitted to the Common Council for its approval, one on behalf of A. Smith & Company, and the other on behalf of Lipman Construction Company. It was the theory of the prosecution that this petitioner accepted the bribe from these two companies, through their respective representatives, Seymour Smith and William Lipman (R. 24-26)—in other words, these persons were the givers of the bribes, which giving they did through one Albert J. O'Connor, who was the go-between (R. 24-26) and who was a witness in the case, for the purpose of influencing petitioner's vote and procuring his influence as a member of the Common Council in favor of these two contracts.

Though trial and conviction was had in Recorder's Court for the City of Detroit, the cause did not originate in that court, but in a different court, the Circuit Court for the County of Wayne. It happened in this wise:

Prior to March, 1941, the Prosecuting Attorney of Wayne County filed in the Circuit Court for the County of Wayne pursuant to a statute hereinafter quoted, a petition praying for the investigation of certain alleged crimes in the county (R. 7-13). The judges of that court granted the prayer of the petition, and appointed Honorable Homer Ferguson, one of their number, to sit as an investigator—as a one man grand jury so-called. Acting in this capacity, on March 19, 1941, Judge Ferguson issued a document (R. 7-13) variously called a complaint, a warrant, an indictment, a presentment, and complaint and warrant, charging this petitioner with the crime aforesaid in three counts, viz.: (1) That August 20, 1940, he had accepted the promise

of $1,000.00; (2) that August 27, 1940, he had accepted $1,000.00; and (3) that on September 18, 1940, he had accepted $4,000.00; all of the above were alleged to have been given and accepted, as we say, to procure Ewald's influence as a member of the Common Council, and his vote, in favor of the two said contracts (R. 7-13).

On the date of its issuance, petitioner was arraigned on said document, not in the Circuit Court from whence it issued, but in Recorder's Court for the City of Detroit, in the manner of arraignments on warrants.

On May 19 following a motion to quash the document was filed (R. 13-15). Later, on August 26, 1941, a plea to the jurisdiction (R. 16) was filed. Later a preliminary examination was had before a magistrate and the Prosecutor filed an information, charging defendant in the same manner as did the document issued out of the Circuit Court. A motion to quash (R. 17-19) this information was filed.

All of these motions were duly denied by the court. All of them, as appears in the record at the pages cited, raised the question of the jurisdiction of Recorder's Court for the City of Detroit, the last four grounds of the motion to quash the information, which reiterates in substance the grounds of the previous motions, being as follows (R. 17-19):

> "2. The warrant issued by the Honorable Homer Ferguson, Circuit Judge, on the 19th day of March, 1941, and apprehension and arrest of the defendant thereunder, are void and of no legal force or effect whatsoever in that the warrant shows upon its face that the crime, if any, was committed within the limits of the City of Detroit, and by reason thereof said Circuit Judge had no power or jurisdiction to investigate the same or to issue any warrant predicated thereon, or to take any

other action seeking the arrest and prosecution of defendant by reason thereof.

"3. Said warrant and the apprehension and arrest of the defendant thereunder are void and of no legal force or effect whatsoever because the filing of the complaint or petition of the Prosecuting Attorney for an investigation of the commission of alleged crime in the County of Wayne filed in the Circuit Court for the County of Wayne under miscellaneous No. 67,804 could not and did not vest any jurisdiction in said Circuit Judge or the Circuit Court to investigate or institute prosecutions for crimes committed outside the jurisdiction of the Circuit Court, namely, in the City of Detroit and hence within the original and exclusive jurisdiction of the Recorder's Court for the city of Detroit.

"4. In proceedings properly brought under Section 17,217 and 17,218 and other sections of the Compiled Laws of the State of Michigan for 1929 relative to the investigation of suspected offenses, the Judge before whom such investigation is being conducted has no power or jurisdiction to issue a warrant to require the defendant to be brought before any other judge than the one who issued the warrant under such proceedings, and said judge, therefore, had no power or jurisdiction to command the arresting officer to bring defendant before the Recorder's Court of the City of Detroit.

"5. No order in writing allowing the issuance of a warrant or process against defendant, signed by the Prosecuting Attorney, has been filed in this court; no complaint for that purpose has been filed in this court; no warrant for the apprehension and arrest of defendant has been issued out of this court; the warrant under which defendant was apprehended and arrested was not issued by any judge of this court in proceedings for the investigation of crime under Sections 17,217, *et seq.*, Compiled Laws of 1929; and no true bill against the

> defendant has been presented or returned to this court by any grand jury sitting herein pursuant to Section 17,221, *et seq.*, Compiled Laws of 1929; and by reason thereof, this court is wholly without power or jurisdiction to proceed against defendant in this manner."

Trial was had in Recorder's Court beginning September 16, before the Honorable W. McKay Skillman, one of the Judges of said court, and a jury.

At this trial Smith and Lipman were not called as witnesses but O'Connor was. Over objection that his testimony was hearsay, and that it denied defendant, this petitioner, his right to be confronted by the witnesses against him (R. 49-50), on the theory of the prosecutor that these persons were co-conspirators with petitioner (R. 24-26), the court permitted O'Connor to testify in answer to questions put to him by the prosecutor that on August 20, 1940, Lipman suggested that the witness contact petitioner by telephone, which he did (R. 58), that at that time Smith and Lipman stated that it would take a lot of money to get this contract and asked O'Connor to hold Thirty Thousand ($30,000.00) Dollars available to be expended at their request, to secure the contract for the Herman Gardens Project, and that right after the conversation Smith and Lipman gave O'Connor the Thirty Thousand ($30,000.00) Dollars (R. 61, 62) comprised of two checks,—$10,000 by Lipman and $20,000 by Smith, that O'Connor made out a deposit slip and gave the checks to Lipman for deposit in a Chicago bank, and that Lipman told O'Connor that defendant, this petitioner, had suggested that he, O'Connor, hold the money (R. 63), and that after the money had been deposited in the Chicago bank Smith asked O'Connor to call this petitioner on the telephone and to so inform him (R. 65), which O'Connor did, and that later Smith stated

to O'Connor, "that Mr. Ewald was a little uneasy and I better take him up a thousand dollars" (R. 68), and that Smith said, "We might as well take a chance and give it to him" (R. 68), all of which conversations, acts, and doings occurred in the said City of Detroit, County of Wayne, and State of Michigan, according to the testimony of the said O'Connor.

The jury found petitioner guilty as charged on September 19, 1941, and sentence was imposed as aforesaid. The cause was removed to the Supreme Court for the State of Michigan for review of errors, and among others the following errors were assigned (R. 2-6):

> "1. The court erred in overruling defendant's motion to quash the warrant and service thereof.
>
> "2. The court erred in overruling defendant's motion to quash the information.
>
> "3. The court erred in overruling defendant's plea to the jurisdiction.
>
> "4. The verdict is against the great weight of the evidence.
>
> "5. The verdict and judgment is contrary to law.
>
> "6. The court erred in permitting the witness O'Connor to give testimony, over timely, objections of defendant, as to acts done and statements made by certain parties, namely Smith and Lipman, such acts and statements having been made out of the presence and hearing of defendant, and the said Smith and Lipman being neither in fact nor in law co-conspirators with defendant.
>
> "7. The court was wholly without jurisdiction to proceed under an information which was predicated upon a warrant by a Circuit Judge for the County of Wayne sitting as a so-called one man

Grand Jury which had no jurisdiction to issue warrants based upon a crime committed in the City of Detroit.

"8. The court erred in overruling defendant's motion for a directed verdict of not guilty.

"10. The court erred in charging the jury as follows:

" 'You will note there is testimony offered here and endorsed on the information are the names of Smith and Lipman. You will note also that the court permitted this proof to go in; on the theory that is claimed by the Prosecution of a conspiracy between Smith and Lipman and O'Connor and Ewald to bring about the bribery of Ewald under Section 118, which I have read to you.

" 'It is on that theory that while Ewald is alone charged with the crime, yet it is claimed, and the theory of it is that that was by virtue of a conspiracy between those four persons that the bribery came about—this alleged bribery came about. So it is on that theory that I have permitted that evidence.

" 'What is a conspiracy? A conspiracy is an unlawful agreement or understanding between two or more persons to do an unlawful or illegal act. I don't need to mention the other phase because it isn't involved here. The rest of the definition is, "or to do a lawful act by illegal and unlawful means," but that isn't involved here. A conspiracy is an unlawful understanding between two or more persons to an unlawful or illegal act. The bribery of a public official under Section 118 is such an illegal and unlawful act. If you are satisfied beyond a reasonable doubt that there was such an illegal or unlawful understanding between these four men to bring about a violation of Section 118—that's the bribery

statute—if you are satisfied beyond a reasonable doubt, then you have satisfied your minds of the existence of a conspiracy.

" 'You must first, therefore, determine that there was such a conspiracy. A conspiracy is merely the unlawful agreement or understanding to bring about an unlawful act. If you find from the evidence, and all the evidence, that there was such an agreemet to do so, then you have established affirmatively in your mind the existence of such a conspiracy.

" 'If you have established the existence of such conspiracy, then under the rules of evidence, the statements, declarations and acts of co-conspirators, during the time of the conspiracy, which are not in the presence of the others, are admissible because that is one of the exceptions to the hearsay rule. In an ordinary case, what O'Connor said to Smith and Lipman, or either of them, not in the hearing and presence of Ewald, would not be admissible against Ewald, but if done on the theory of a conspiracy, and if the State establishes the existence of such a conspiracy in your minds beyond a reasonable doubt, you should entirely disregard any conversations had, not in the presence and hearing of the defendant Ewald, between O'Connor and Smith and Lipman or Smith or Lipman.'

"11. The court erred in charging the jury as follows:

" 'If you are to consider the conversations between O'Connor, Smith and Lipman, in the absence of Ewald, it will have to be on the theory that the four of them entered into a conspiracy. If you find such a conspiracy, beyond a reasonable doubt, to bring about the violation of Section 118, then and in that event, all that testimony is competent, and the weight to be given it is a question of fact for the jury.' "

The Supreme Court of the State of Michigan, after a full hearing on the merits, affirmed the sentence June 5, A. D. 1942, and denied a motion for a rehearing October 8, A. D. 1942. (See certified record.)

Petitioner here asks a writ of certiorari to review the action of the Supreme Court of the State of Michigan.

## III.

## SUMMARY OF ARGUMENT

A. Petitioner was denied rights and immunities guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States because he was tried, found guilty of a felony and sentenced, in Recorder's Court for the City of Detroit, which said court was without jurisdiction, for the following reasons:

1. The prosecution was originated by a document issued in another court, namely, the Circuit Court for the County of Wayne, which said document charged petitioner with a crime allegedly committed within the corporate limits of the City of Detroit and commanded that he be brought before said Recorder's Court for arraignment and trial, which said document the said Circuit Court had no jurisdiction to issue, because under the statute by virtue of which the proceedings were had in said Circuit Court that court had no jurisdiction as to crimes in any other jurisdiction than its own, which said jurisdiction did not extend within the corporate limits of the City of Detroit nor could said Circuit Court direct that he be brought before the said Recorder's Court under the terms of the same statute; wherefore, the said document was void and conferred no jurisdiction upon the said Recorder's Court.

2. Even had the aforesaid document issued from the Circuit Court as aforesaid been valid and within that

court's power to issue, it conferred no jurisdiction upon the said Recorder's Court because that court has exclusive and original jurisdiction of all felonies committed within the corporate limits of the City of Detroit, and prosecutions there can be initiated only by an indictment by a grand jury, or upon information preceded by a complaint; this document was neither, nor did it originate in Recorder's Court, wherefore said Recorder's Court never acquired jurisdiction.

B. Petitioner was further deprived of rights and immunities guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States because during his trial in Recorder's Court for the City of Detroit he was deprived of his fundamental right to be confronted by the witnesses against him when the witness O'Connor was permitted to testify as to the conversations, acts, and deeds of third persons not in the presence of defendant; and the court erred in allowing such testimony on the theory that it was statements, acts, and deeds of co-conspirators with defendant, because the third persons and O'Connor were givers of a bribe while petitioner was allegedly the acceptor of a bribe, which are two separate and distinct offenses, whereby there was no common intent, hence no conspiracy.

## IV.

## ARGUMENT

### A. RECORDER'S COURT FOR THE CITY OF DETROIT WAS WITHOUT JURISDICTION IN THE CAUSE.

It was claimed in the trial court, by the motion to quash the document issued by the Circuit Court, by the plea to the jurisdiction, and by the motion to quash the information, that that court had no jurisdiction. The same claim was presented in the Supreme Court by the Assignments of Error as above. It was a claim insistently made throughout all of the proceeding below. Trial in a court without competent jurisdiction is a denial of due process.

The Circuit Court for the County of Wayne *exists* by virtue of Article VII of the Constitution of the State of Michigan, Sections 1 and 10, of which are as follows:

> Sec. 1. The judicial power shall be vested in one Supreme Court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.
>
> Sec. 10. Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and *not prohibited by law,* and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior

courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

It was to this court that the Prosecutor for Wayne County, sometime before March 19, 1940, presented his petition to investigate alleged crimes in Wayne County, and on which the court acted favorably and appointed one of its judges to sit as investigator. These proceedings were had pursuant to Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan for the year 1917, being Sections 17217 and 17218, Compiled Laws of the State of Michigan for the year 1929, to which we shall refer as the "Discovery Act," and which sections of the statute are as follows:

> 17217. Whenever by reason of the filing of any complaint which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed *within his jurisdiction*, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.
>
> 17218. If upon such inquiry the justice or judge shall be *satisfied* that any *offense* has been *com-*

*mitted* and that there is *probable cause to suspect* any person or persons to be guilty thereof, he may cause the *apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint.* And if upon such inquiry the justice or judge shall find from the evidence that there is *probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal,* the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under law to conduct removal proceedings against said officer. And said finding shall be sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the manner prescribed by law for a hearing and determination of said charges. *And in respect of communicating or divulging any statement made* by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, *at the discretion of such justice, be admitted to such inquiry,* shall be governed by the provisions of law relative to grand jurors.

Acting under whatever authority these two sections of the statute conferred, the investigator, Honorable Homer Ferguson, one of the Judges of Wayne Circuit Court, on March 19, 1940, issued the nondescript document referred to variously as a warrant, a complaint, a presentment, and complaint and warrant, (R. 7-13), charging this petitioner with the offense named, and

directing his apprehension and commanding that he be brought, not before Wayne Circuit Court which issued the document, but before Recorder's Court for the city of Detroit.

This latter court differing from Wayne Circuit Court, is not created by any constitutional provision, but its existence rests wholly in the acts of the State Legislature. Recorder's Court was created as a successor to the pre-existing Police Court and Mayor's Court by the city charter of 1857, but it was created substantially as it now exists by Act No. 326 of the local acts of the State of Michigan for the year 1883, as amended, so that now it has jurisdiction of felonies, misdemeanors, and city ordinance violations. Section 11 of that Act, being Section 16300 of the Compiled Laws of the State of Michigan for the year 1929, to which we shall refer as the Jurisdiction Provision, provides:

> "The said Recorder's Court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the Circuit Courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments,

> as heretofore, for crimes and offenses committed within the limits of said city."

It is, we think, evident that this legislation carved out from the territorial jurisdiction of the Circuit Court a portion coincident with "the corporate limits of the City of Detroit" and vested "original and exclusive jurisdiction," extending to "all prosecutions and proceedings" as to offenses mentioned in the Recorder's Court; and that it did so was the holding of the Michigan Supreme Court in *People v. Hurst,* 41 Mich. 328, insofar as felonies are concerned. Indeed, we are very sure that the Prosecutor will agree that for many years the universal practice of Detroit and Wayne County has been that all felony cases wherein the venue was within the corporate limits of the City of Detroit have disposed of by Recorder's Court, while those within the County of Wayne but outside the city limits were disposed of by Wayne Circuit Court.

The question involved here is whether or not Recorder's Court acquired jurisdiction of the crime by virtue of the document issued by Judge Ferguson.

If the Circuit Court had no jurisdiction to issue the so-called warrant, it would, of course, be void whereupon it could confer no jurisdiction on Recorder's Court. Consequently the first question is whether or not the Circuit Court had such power.

Again, even if the Circuit Court had such power, the question arises whether the Recorder's Court had jurisdiction over a cause initiated in that manner.

These are the two issues as to jurisdiction as we see them.

**(a) The Circuit Court Had No Jurisdiction to Issue the So-Called Warrant.**

It will be observed that the Discovery Statute quoted above only goes so far as to authorize a judge to investigate an offense which "shall have been committed within his jurisdiction." No power exists to investigate crimes that may have been committed outside such jurisdiction. It is obvious that the allusion is to territorial jurisdiction, and so the Supreme Court of the State of Michigan held in *In re Hickerson,* 301 Mich. 278. The territory designated as "the corporate limits of the City of Detroit" has been carved right out of former jurisdiction of the Circuit Court by the Jurisdiction Provision above quoted. It is not in the jurisdiction of the Circuit Court, and consequently that court had no jurisdiction to investigate the crime charged in the so-called warrant, for it is shown on its face that the crime was allegedly committed in the City of Detroit. For this reason the so-called warrant was void.

Still further, the next section of the statute expressly provides how the investigating judge shall proceed if he finds that a crime has been committed within his jurisdiction, and this provision expressly precludes the action taken in the instant case. It provides that "upon the return of such process—the justice or judge shall proceed with the case—in like manner as upon formal complaint." This effectually precludes the issuance of any warrant containing a command to produce the prisoner before another court. Consequently the command to produce the prisoner before the Recorder's Court was void.

There was therefore nothing before the Recorder's Court when this petitioner was brought before it for arraign-

ment on the so-called warrant, so that that court did not then nor at any time later acquire jurisdiction. The so-called warrant was void under the terms of the statute which it was claimed authorized it.

In a comparatively early case in Michigan, *People v. Duncan,* 97 Mich. 632, the Supreme Court of that state held as follows:

> *Per Curiam.* Where, upon an affidavit made by the accused that the examining magistrate is a material witness for the prisoner, he is taken before another magistrate for examination by direction of the first magistrate, such action is illegal, and the justice who issued the warrant does not lose, nor does the other magistrate acquire, jurisdiction of the case; and the prisoner should be taken before the magistrate who issued the warrant, and he should proceed with the examination."

The Supreme Court of Michigan recently decided two cases, one of which we cited above, but which we would not mention in this connection had that court not done so in its opinion in this case, because we believe them to be utterly wide of the mark.

*In Re Watson,* 293 Mich. 263, held that the investigator sitting in Wayne Circuit Court might compel the attendance of a witness though he resided in the City of Detroit. It does not, however, hold that the investigator may issue a document charging a crime committed within the corporate limits of that city, nor to require the defendant to be brought before another court. The case simply isn't in point.

*In re Hickerson,* 301 Mich. 278, cited above, held that a justice of the peace, acting under the discovery statute, could inquire into the commission of crimes not cognizable by a justice of the peace. The Supreme Court of Michigan

held that the justice's power to investigate was not limited by the discovery statute to his power to hear and determine cases, but was limited by that act to its territorial jurisdiction, which is exactly what we contend. The court said, page 282:

> "Thus it is seen that the situation in the Watson case was parallel to the facts herein, and it was held that the controlling element was the *territorial* jurisdiction of the court conducting the grand jury, not the limitations upon the court's power to hear and determine criminal cases."

It will thus be seen that the Hickerson case is no more in point than the Watson case, except that the Michigan Supreme Court sustains us in what seems to us obvious, that the limitations of territorial jurisdiction apply and govern. In the instant case the Supreme Court did not follow its own ruling in the Hickerson case.

From the foregoing we think it clear that the so-called warrant, because it charges a so-called crime committed within the corporate limits of the City of Detroit, and was made returnable before Recorder's Court, was beyond the jurisdiction of the Wayne Circuit Court, and was therefore void.

**(b) Even if the So-Called Warrant Were Valid, Recorder's Court Acquired No Jurisdiction.**

There are in Michigan but two ways in which a criminal prosecution can be initiated,—first, by the indictment of a grand jury; and second, by a complaint filed or made on oath, followed by an information. Either an indictment or a complaint must appear in order to confer jurisdiction. Very specifically on this point, is a case where the pertinent statutes were as they are today, wherein the Michigan Su-

preme Court so held. In *Jankowski v. Connolly*, 197 Mich. 257, the court said:

> "It is therefore manifest that the only statutory methods whereby one may be prosecuted in the Recorder's Court of the city of Detroit are the following:
>
> (1) Upon on indictment returned by a grand jury sitting in the Circuit Court for the County of Wayne and duly certified and transmitted by the clerk of the Circuit Court to the Recorder's Court.
>
> (2) Upon an information signed by the prosecuting attorney of the County of Wayne upon which shall be indorsed the names of witnesses known to him, and which shall be filed during term in the said recorder's court."

Obviously this was not an indictment in the instant case for the investigator is not a grand jury, though popularly referred to as a "one man grand jury." This is manifest from the terms of the discovery statute itself because it provides for the secrecy of the proceedings that it "shall be governed by the provisions of law relative to the grand jury," thus recognizing that it, itself, is not a grand jury. Nor does the proviso in the Jurisdiction Provision, which expressly reserves to the Recorder's Court the power to initiate proceedings by indictment refer to the investigator, because this proceeding was not in existence until 1917, many years after the jurisdiction statute was enacted. Consequently a reference to the grand jury in the Jurisdiction Provision could not mean the investigator under the Discovery Statute. Nor does the Discovery Statute authorize the issuance of indictments, which is the essence and very existence of the grand jury. It is true that it may "cause the apprehension" of any person suspected of com-

mitting a crime, and then it must proceed "in like manner as upon formal complaint." This contemplates the subsequent examination of the alleged offender and an information by the Prosecuting Attorney—the very antithesis of an indictment.

This last mentioned provision of the Discovery Statute is, we think, quite convincing as to our position. When the investigator issues his process to apprehend the suspect, he is then to proceed "in like manner as upon formal complaint." In other words, the sworn testimony before the investigator takes the place of the usual complaint. His process by which the suspect is apprehended and brought into court is based thereon. This testimony, and it alone, gives him the power or jurisdiction to issue the process. But that testimony remains in his court. In the case at bar it was in the Circuit Court, and not in the Recorder's Court. Consequently when petitioner was arraigned in the Recorder's Court there was nothing before that court except the naked document itself, and it not in the court, but presumably in the hands of the officer to justify his custody of the defendant. It is the complaint that gives the court jurisdiction, not the warrant or process for apprehension of the defendant, for that is only a means of bringing the defendant into court. This elementary principle was laid down very early in *United States v. Burr*, 25 F. Cas. No. 14,692, Brunn. Coll. Cases 493, and in Michigan by the cases of *People v. McLean*, 68 Mich. 480, and *People v. Lynch*, 29 Mich. 274.

In the absence of any complaint or indictment, there never was any case initiated in Recorder's Court, so that that court never had jurisdiction, even though we should admit for the sake of the argument that the investigator could issue process for a crime committed in the City of Detroit.

But still further, we must remember that under the terms of the Jurisdiction Statute, Recorder's Court has "original and exclusive" jurisdiction. The exact language in another statute has been determined by the Michigan Supreme Court to preclude jurisdiction in any other court.

The case of *Perrott v. Pierce,* 75 Mich. 578, was decided by the Michigan Supreme Court in 1889. Realtor, a Justice of the Peace, sought by mandamus to compel Pierce, the Prosecuting Attorney for Bay County, to appear and prosecute a case before Realtor as Justice of the Peace. Respondent refused on the ground that the crime was committed within the limits of Bay City, and that the Police Court of that city by statute had "original and exclusive" jurisdiction, which deprived the Justice of jurisdiction. Reference to Section 161 of the Local Acts of the Legislature of the State of Michigan for the year 1887, shows the following, very similar in some respects to the Jurisdiction Statute in the instant case:

> "Sec. 161. The police court shall have exclusive and original jurisdiction to hear, try and determine all criminal cases wherein the crime, misdemeanor, or offense charged shall have been committed withinthe corporate limits of the city of Bay City, or upon any lands, tenements or hereditaments owned or occupied by or under the authority of the city of Bay City, within the County of Bay, and which crime, misdemeanor or offense would be, now or hereafter, cognizable by a justice of the peace if the same had been committed in any other part of this State; to entertain, conduct and dispose of all preliminary examinations into crimes, misdemeanors, or offenses, which shall have been committed within the corporate limits of Bay City; to hear, try and determine, or otherwise lawfully entertain, conduct and dispose of all cases and proceedings arising within the corporate limits of the

city of Bay City under the laws of this state relative to disorderly persons, illegitimate children, fugitives from justice from other states and foreign countries, the preservation of the public peace and the prevention of crime: Provided, however, That this act shall not be in any wise construed to interfere with or affect any of the powers of or the authority conferred by law upon the grand jury of the county of Bay."

The court said in the Perrott case, pages 578-580:

> "The *respondent denies the right of relator to issue the warrant* or to try the case, and insists that he is without jurisdiction to entertain proceedings therein; that the police court has exclusive jurisdiction to hear, try, and determine all criminal cases where the offense charged shall have been committed within the city, and which offense, if committed without the city, would have been within the jurisdiction of the justice to try and determine, under the general laws of the State giving the justices jurisdiction. * * *
>
> "The police court having the exclusive power to hear and try the case against the respondent therein, it follows that the *proceedings before the justice were unwarranted, and the prosecuting attorney was right* in not complying with the request of the justice, and the writ must be denied, but without costs."
>
> *Perrott v. Pierce*, 75 Mich. 578 (578-9, 580).

Because, then, the Recorder's Court had by the terms of the statute creating it original and exclusive jurisdiction of the crime, it could not be originated in another court. For this reason also the Recorder's Court was without jurisdiction.

**(c) Trial in a Court Without Jurisdiction Is Denial of Due Process of Law.**

That the Fourteenth Amendment to the Constitution of the United States guarantees to each citizen that he will not be deprived of liberty without due process of law is doubtless so elementary as to be taken for granted. Hardly less elementary is it that one of the primary requirements of due process is that he is, when charged with a felony, entitled to a trial in a court of competent jurisdiction, and is immune to trial in any other court.

This court said in *Scott v. McNeal,* 154 U. S. 46, 4 S. Ct. 1108, 38 L. Ed. 896:

> "The 14th Article of Amendments of the Constitution of the United States, after other provisions which do not touch this case, contains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Viriginia ('Virginia v. Rives'),* 100 U. S. 313, 318, 319 (25:667, 669); *Ex parte Virginia,* 100 U. S. 339, 346 (25:676, 679); *Neal v. Delaware,* 103 U. S. 370, 397 (26:567, 574). And the first one, as said by *Chief Justice* Waite in *United States v. Cruikshank,* 92 U. S. 542, 554 (23:588, 592), repeating the words of *Mr. Justice* Johnson in *Bank of Columbia v. Oakley,* 17 U. S. 4 Wheat. 235, 244 (4:559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'
>
> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under

the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington v. Attrill,* 146 U. S. 657, 683, 684 (36:1123, 1133); *Mobile & O. R. Co. v. Tennessee, ante,* p. 793.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice, to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by *Mr. Justice* Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.''

*Scott v. McNeal,* 38 L. Ed. 896 (901).

*In re Monroe,* 46 F. 52, involved an application for a writ of *habeas corpus.* The court said at pages 53-4:

"The very first question that meets us upon the threshold of a case where a writ is issued which may affect proceedings of the state court is, does

the federal court have jurisdiction to issue a writ in behalf of the liberty of a citizen who is alleged to be illegally restrained? How far may the federal court go in its investigation of the legality of the process, which, as is alleged, is in restrain of the liberty of a citizen of the state, or of the United States? There seems to be a misconception in the public mind as to the power of the federal court in this regard, and it is a mystery in my mind how that misconception can exist in the face of the constitution and laws of the United States. There is no invasion of any prerogative or power of the state by the exercise of jurisdiction of this kind, because there is no prerogative that belongs to any state, nor is there any power or jurisdiction in a state to deprive any citizen of liberty without due process of law. The constitution of the United States, by the first section of the fourteenth amendment, provides that: 'Nor shall any state deprive any citizen of life, liberty, or property without due process of law.' When a citizen is deprived of any of these rights, the power of the United States can be invoked in behalf of the citizen. The constitution of the United States, by its own terms, erects an insurmountable barrier against any state or federal authority that can be exercised to restrain the liberty of a citizen without legal warrant. It matters not whether it is done under color of state authority or national authority; it is a restraint of liberty that is unwarranted, and the authorities upon that subject are abundant, and some of them are cases very similar to this. That which is a part of a state has of course no higher power than a state. A municipal government is carved out of a state, and is a part of the state machinery. Wherever there is an inhibition against a state doing a thing, the supreme court of the United States in many cases has held that the inhibition goes against any part of the legal machinery of the state, as

well as against the whole of it. In California in the case that is recognized as the *Stockton Laundry Case*, 26 Fed. Rep. 611, it was decided that a party who was held in custody for a violation of a city ordinance which is in conflict with the fourteenth amendment to the constitution is entitled to be discharged on *habeas corpus;* and in the *Laundry License Case,* 22 Fed. Rep. 701, it was held that, under the Revised Statutes of the United States, Secs. 751-755, federal courts have jurisdiction of *habeas corpus* proceedings in the case of imprisoned without due process of law under an invalid city ordinance. In a comparatively recent case decided by Judge Gresham *(Ex parte Perkins*, 29 Fed. Rep. 908) it is declared:

> "'An order or judgment of a court, acting within its jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled by another court; but if a court having no jurisdiction over the parties or the subject-matter before it sentences a party, a witness, or any other person to imprisonment for contempt of its authority, the person thus illegally deprived of his liberty may be released by any court authorized to issue writs of *habeaas corpus.*'

"The court in that case refers to a great many other cases but the doctrine is so well enunciated that it is hardly necessary for me to refer to them."

*In re Monroe,* 46 Fed. Rep. 52 (53-4).

*In re Kelly,* 46 F. 653, also involved a *habeas corpus.* The court said at page 659:

> "The Clatsop county justice assumed jurisdiction of a crime not committed or triable in his county, and his commitment is void, not due process of law. Being an officer of the state, his act is so far that of the state, and violates the four-

> teenth amendment, which prohibits any state from depriving 'any person of life, liberty, or property without due process of law.' "
>
> *In re Kelly,* 46 F. 653 (659).

Petitioner herein having been tried in and sentenced by a court not having jurisdiction, we believe his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States have been violated, and that a writ of certiorari should issue as prayed.

### B. PETITIONER WAS DENIED THE RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.

By the testimony of the witness O'Connor, over the objection of this petitioner that he was being denied the right of being confronted by the witnesses against him, the Prosecutor introduced into evidence the conversations, acts, and deeds of Smith and Lipman, who were not sworn and who did not testify. The substance of this testimony went to the heart of the case, and without it the Prosecutor would not have had a *prima facie* case.

The Court admitted this testimony on the theory that there was evidence from which the jury might find that O'Connor, Smith, and Lipman were co-conspirators with Ewald, whereby the testimony would be admissible as statements and acts of co-conspirators. In this we think the court was in error, for the following reasons:

This petitioner was charged with the crime of accepting a bribe as a public officer, each of the three counts charging a violation of the same statute, being Section 118 of the Michigan Penal Code, which is Act 328 of the Public Acts of the State of Michigan for the year 1931,

Michigan Annotated Statutes, Section 28.313. It was the theory of the Prosecutor, and the evidence tended to show that O'Connor, Smith, and Lipman were the givers of the bribe. Giving a bribe to a public officer is provided for in the next preceding section of the same statute, namely, Section 117.

It has been definitely established in Michigan that the giving of a bribe and accepting of a bribe are two separate and distinct crimes. In *People v. Frye,* 248 Mich. 678, the Michigan Supreme Court said at pages 682-3:

> "Bribery is not a joint offense of the giver and receiver, although physical acts of at least two persons must concur to render one guilty of receiving a bribe. Under our statutes, it is made a separate offense as to each, is defined in separate paragraphs, and different penalties are provided. Personal, not joint, corrupt intent is an element of each offense. The giver of a bribe is punishable under 3 Comp. Laws 1915, Sec. 14978, and his offense is complete when he corruptly offers a bribe, although the other refuse it or take it innocently or to deliver the giver to justice. The receiver is chargeable under Sec. 14979, and his offense is complete when he corruptly accepts a bribe, although the giver has no corrupt intent in offering the gift. The following authorities support the separate nature of the offenses of giving and receiving bribes, both at common law and under statutes similar to ours, and hold that one may be convicted and the other acquitted. We have found no authorities to the contrary. *Henslow v. Faucett,* 3 A. & E. 51; *People v. Bunkers,* 2 Cal. App. 197 (84 Pac. 364, 370); *United States v. Dietrich* (C.C.) 126 Fed. 664; *Commonwealth v. Murray,* 135 Mass. 530; *State v. Dudoussat,* 47 La. Ann. 977, (17 South. 685); *Sims v. State,* 131 Ark. 185

(198 S. W. 883); *Minter v. State,* 70 Tex. Cr. 634 (159 S. W. 286)."

*People v. Frye,* 248 Mich. 678 (682-3).

Since the two crimes are distinct, the giver and acceptor of a bribe do not and cannot have a common purpose, and therefore cannot be co-conspirators. It was so held in *U. S. v. Dietrich,* 126 Fed. 664. Consequently, the testimony of O'Connor was not as to the statements of co-conspirators, and petitioner was deprived of the right to be confronted with Lipman and Smith whose statements and deeds were put upon the record through the testimony of O'Connor.

This court has always held that denial of fundamental rights, such as the right to counsel, the right to a jury trial, etc., is a denial of due process of law. Very recently in *Glasser v. U. S.; Kritze v. U. S.;* and *Roth v. U. S.,* ... S. Ct. ....., 86 L. Ed. 405, this court held, with reference to denial of a full right to have counsel was in a federal court, denial of due process, contrary to the Sixth Amendment to the Constitution. The court went on to say, speaking through Mr. Justice Murphy:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If

the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389, 81 L. Ed. 1177, 57 S. Ct. 809; *Ohio Bell Teleph. Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724."

*Glasser v. United States,* 86 L. Ed. 405 (412).

The right of a defendant to be confronted by the witnesses against him has been held to be a fundamental right. *West v. Louisiana,* 194 U. S. 258, 48 L. Ed. 965.

Other cases where this court has held that denial of a fundamental right by a state court is contrary to due process of law, and a violation of the Fourteenth Amendment to the Constitution of the United States are:

*Powell v. Alabama,* 84 L. Ed. 527;
*DeYonge v. Oregon,* 299 U. S. 353, 57 S. Ct. 255;
*Grosjean v. American Press Co., Inc.,* 297 U. S. 233, 56 S. Ct. 444;
*Gitlow v. People of the State of New York,* 268 U. S. 652, 45 S. Ct. 625;
*Near v. State of Minnesota,* 283 U. S. 697, 51 S. Ct. 625.

The petitioner was denied in the Recorder's Court for the City of Detroit at his trial the fundamental right to be confronted by the witnesses against him. This is contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States. This matter was urged upon the Supreme Court of that state through assignments of error.

## V.

## RELIEF SOUGHT

Petitioner asks that a writ of certiorari issue from this court to the Supreme Court of the State of Michigan to review its affirmance on June 5, 1942, of the sentence imposed by the Recorder's Court of the City of Detroit, and said Supreme Court's denial of an application for rehearing of October 8, 1942.

Respectfully submitted,

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Dated: October 29, A. D. 1942.